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No. 939

In the

Supreme Court of the United States

JUNE KEGLEY, a Widow,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Mr. Justice Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Mrs. June Kegley, a widow, for and in behalf of herself and her minor children prays that a Writ of Certiorari issue to review the action and the judgment of the United States Court of Appeals for the Fifth Circuit, entered on August 15, 1967. Petition for rehearing was denied on October 9, 1967.

I.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals is printed in Appendix "A" hereto and has not yet been reported.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1967. Rehearing was denied on October 9, 1967. The jurisdiction of this Court is invoked under Article 28, U.S.C., Sec. 1254 (1).

III.

QUESTIONS PRESENTED

1. Whether a Court of Appeals may render a judgment in a diversity case, applying substantive law which is in direct conflict with the law of the State from which the case was appealed as declared by the Supreme Court of the state.

2. Whether a Circuit Court of Appeals may reverse and render the judgment of the Trial Court and hold as a matter of law in so doing that evidence did not raise issues of fact for the jury without denying to Petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States in a case in which fact issues for the jury were clearly raised by an overwhelming preponderance of the evidence.

3. Whether a Circuit Court of Appeals can disregard evidence showing that same was an accidental personal injury followed by a visible contusion and wound as required by the terms of the policy and then render said judgment.

4. Whether a Circuit Court of Appeals can disregard the facts and make an independent investigation of the facts and assume from the defendant's medical witness that the testimony of said witness alone is true when the testimony of said witness is based upon hypothetical evidence assuming facts not in evidence.

5. Whether the Court of Appeals could ignore the evidence of Dr. Homan that a wound is visible evidence of injury as required by the terms of the policy.

6. Whether the Circuit Court of Appeals has violated Petitioner's constitutional right to have her case decided by the law of Texas in a case where the Court of Appeals refused to consider the Texas cases on the question and in the face of the opinion shows that the Court of Appeals assumes that the Supreme Court of Texas would not follow the Texas decisions, whereas under the Constitution and authority of this Honorable Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188 (1938), the Court of Appeals was bound to follow the Texas rule.

7. Whether a Circuit Court of Appeals can depart from prior holdings of the Fifth Circuit and from the well established law of Texas by disregarding cases both in Texas and

in the Fifth Circuit that were in support of the judgment of the Trial Court.

8. Whether the question of causation with reference to death is a matter for competent medical evidence or whether the Court of Appeals is justified in making their own findings from consultation with dictionaries and from relying on quotations of testimony from one of Respondent's witnesses that assumed facts not in evidence in this cause, the evidence of the expert being inadmissible as a matter of law.

9. Whether in cases of policies of insurance such as this any uncertainties and ambiguities in such policies are to be determined in favor of the policy holder, Petitioner herein, by the application of ordinary rules of construction and the intention of the parties and whether such policies shall be construed strictly against the insurer and liberally in favor of insured so as to affect the dominant purpose of the contract of insurance.

10. Whether if conditions, exceptions and exemptions from or limitations of liability of the insurer are not plainly expressed they will be construed against the insurer when under Texas law the policy terms are such that at the time the Respondent collected the premiums Petitioners had the right to assume that they would be covered by the accidental injuries causing death provisions of the policy as applied to the facts of this case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U.S.C., Sec. 1652 which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

V.

STATEMENT

This is a diversity of citizenship case filed by the widow and surviving children of Joseph Felix Kegley against the Respondent herein on a group policy issued to the Halliburton Company by Respondent and a certificate of insurance issued to the deceased employee, Joseph Felix Kegley.

The group policy issued to Halliburton Company and the certificate of insurance issued to the deceased employee, Joseph Felix Kegley, provided for death benefits of $75,000.00

under a specific, limited coverage only. The pertinent provisions of the policy state:

"ARTICLE II—BENEFITS

Section 1—Special Accidental Death and Dismemberment Benefits:

If an employee suffers a bodily injury caused by an accident and as a direct result of such injury, and, to the exclusion of all other causes, sustains within not more than 90 days after the date of the accident which causes such injury any of the losses listed in the Table of Benefits in this section, then provided:

(a) The injury occurs while insurance is in force for the employee under this policy; and

(b) The injury is evidenced by one or more visible contusions or wounds on the exterior of the body, except in the case of drowning; and

(c) The loss resulting from the injury is not excluded from coverage in accordance with Section 3 of this Article;

The Insurance Company shall, subject to the terms of this policy, pay with respect to such loss a benefit determined from said Table of Benefits and based upon the Principal Sum for which the employee was insured on the date of said accident but in no case shall more than the Principal Sum be paid for all losses sustained by an employee through any one accident.

Table of Benefits

In the event of Loss of Life	The Benefit Will be the Principal Sum

* * *

Section 3. Exclusion:

No insurance is provided and no benefits shall be payable under Section 1 of this Article with respect to any

loss or under Section 2 of this Article with respect to disability terminating in death if the loss under Section 1 or the disability under Section 2, or any injury from which such loss or disability results, is caused or contributed to by, or is a consequence of, or is in any way attributable to, any of the following excluded risks, even though the proximate or precipitating cause of said loss or disability is a bodily injury caused by an accident:

(a) Bodily or mental infirmity; or

(b) . . .

(c) Disease of any kind, except a pyogenic infection attributable solely to and occurring as the proximate result of an injury not excluded by this Article; . . ."

The deceased, Joseph Felix Kegley, was an employee of Halliburton Company. He died in Ward County, Texas, on December 30, 1961, at the age of 40 years (R. 184, 189, all references herein being to the page number in printed record). Mr. Kegley's position with Halliburton was described as a treater (R. 65), a cementer (R. 108) and a supervising foreman of the frac crews (R. 139). Most of his work was done outside. It involved some physical and muscular exercise (R. 134) but he acted primarily in a supervisory capacity (R. 139, 141-142, 253). He would see that the necessary equipment got out of the Halliburton yard and set up on location in time to do the particular job required (R. 65, 108, 139, 142). He also monitored certain equipment during the time the job was run (R. 242-243).

Mr. Kegley was described as industrious, a good hand and a hard working man (R. 65, 109, 127). He appeared to be in good health (R. 109, 140, 147).

In connection with the record of the evidence in this case, we would show that the Respondent laid behind the log and it was not until the Trial Court required the Respondent to produce the work records of the deceased, Joseph Felix Kegley, that we were able to get a true situation as to the over exertion in which Kegley indulged during the period of time involved which resulted in an accidental injury proximately causing a coronary occlusion evidenced by a visible contusion or wound.

The Court in reading the record will note that the evidence of Dr. Homan was much stronger than the first two hypothetical questions propounded to the other witnesses, the treating physician, Dr. Prout and Dr. Tull of Abilene, and the hypothetical question which sets forth the evidence required Dr. Homan to assume that based on said work records the true fact situation was as follows:

> "Q. . . . I want you to assume that following the Christmas holidays on December 26th of '61 that he, according to Ticket No. 283753, in Vehicle No. 12696, and Employee No. 6250, that he on that day spent ten and a half hours at work, six hours of which was spent in loading and unloading and breaking out pipe in the yard, that he had to get up real early to go do this or would have to do it at night after they finished work so that they would have the chemicals to do the frac jobs that they were specialists in doing, and that according to the job or the demands of the job, why, they would (338) have from forty to one hundred fifty sacks of salt alone weighing a hundred pounds and had some other sacks of various other chemicals that weighed fifty or more pounds, and that the members of that crew, including Kegley, was observed lifting this stuff up there and loading it into the truck, during these

three days previously, and that in addition to that, that they had two-inch and three-inch and four-inch pipe, twenty feet long, which we haven't been able to prove the weight of, but that has been described as being—by a man that had been an employee of Halliburton for years—as being very heavy pipe, that he had to lift that also; and then I want you to assume that after he got out on the job he would have to lift the pressure recorder weighing some fifty pounds out of the truck and then move a frac-o-meter, and then take this pipe and move it out of the truck that he had already loaded so that he could do the job and make a connection with the hose and the frac-o-meter and the other things that they were running pressure tests on after they got to the location; and then I want you to assume that on each day that as a part of his job that he even had to get up and watch a thing called a monitor and all of which time he would have to stand and be sure (339) that the pressure remained even, and that has been described as a very nerve-racking and tedious job by a fellow employee, and that on that particular day he spent two hours according to the running job ticket doing that, and then on that particular day, driving from camp to the job, one and a half hours; I want you to assume that during all this period of time beginning with December 26th, after the other employees got through work that he even had paper work to do as a supervisor of the gang in making reports to the company and other things that would take two or three hours that the others didn't have to do, they could just go home, and that even when he got home if he didn't do all of his paper work at the office he would have to do his paper work at home, and did do it. Then I want you to assume that beginning with this period that he became extremely exhausted averaging only four or five hours' sleep per night, and appeared to be very worried and tense and suffered from a great deal of anxiety, according to his wife; I want you to assume that he went through the

same kind of labor on 12-28-61 according to Ticket No. 283755. . . .

"Q. The second ticket is No. 283754, with the same employee number and the same vehicle number, and it shows that on that date that he spent seven hours helping load these heavy objects, the heavy pipe and the heavy salt, and then thereafter he spent one and a half hours standing out there monitoring the frac-o-meter, that he had to wait two hours on the location at the job, and he spent one hour driving from the job to the camp, or a total of twelve and a half hours. I want you to assume that according to Ticket No. 283755, same employee number and same vehicle number, with his occupation being listed all the way through as a cementer, and with the tickets being signed by his supervisor and signed by him personally, that he spent six and a half hours doing this heavy work of loading and unloading these heavy materials, and that on that particular day that he had to spend six (341) hours standing up in one position monitoring and watching, something that nobody else did except him, that tedious type of a situation, that he also had to wait an hour and a half after the job, and spent another two hours, one hour each way, driving from the camp to the job, for a total of sixteen hours. . . .

"Q. Now, I want you to assume that on December 29, 1961, according to Ticket No. L-283756—all of these tickets are listed with an "L" before the number, they all appear in consecutive order according to the numbers, same employee number and same vehicle number, this was the day before his death, that he worked a total of nineteen hours. Now, that doesn't include the time that it would take him to drive from the yard to his home or the time it would take him to drive from his home to the yard, but recognizing that there are only twenty-four hours in the day, it can be seen that he received very little sleep at night, and he was described, assume, as being very, very exhausted, and

dropped off to sleep in his chair with a pencil between his fingers, his wife said that he was a picture of complete exhaustion. I want you to assume (342) that after this hard day's labor of nineteen hours, not counting the time going home and back, that he complained the next morning of being very, very tired to fellow workmen; I want you to assume that on that day he had to spend six hours loading and unloading these heavy objects, but that on that particular day he had to do something else particularly strenuous and something that is listed as maintenance work, "Working on frac-o-meter," and which we know from the testimony of an employee by the name of Gibbs that a sledge hammer had to be used by someone, he doesn't know whether it was him or Kegley, but since they had to spend eight hours repairing this machine—no, three hours repairing the machine—apparently it required quite a lot of hammering; and I want you to assume that on that particular day he again for eight long hours had to stand in this one spot monitoring this machine to see that the pressure would stay right, that a half hour of that was waiting at the location for the job to begin, an hour of it was spent driving from the camp to the job, and a half hour was spent in driving from the job to the camp. Then on the day of his death I want you to assume that with the hour showing to begin at 5:00 o'clock, he for two hours engaged in this heavy lifting operation (343) and in loading and unloading those heavy pipes and those heavy sacks of chemicals and then he waited a half hour at the job, and spent an hour driving from the camp to the job; I want you to assume that during the period from five to seven o'clock or to eight o'clock he was engaged according to this ticket from five to eight o'clock in loading these heavy objects onto the truck, and then he drove to the job, waited there a half an hour, and within thirty minutes of the time that he had last lifted these heavy objects according to this time sheet he had a heart attack and died. Now,

the way it was noticed that he was preparing to have his heart attack was that he clutches on to the panel of the truck in such a way as to convince a co-worker by the name of Winkler that something seriously was wrong, and this Mr. Winkler turned and saw him standing there clutched to the truck and said, "Hey, Joe, what is wrong?" and with that he fell over. I want you to assume that an ambulance was called and that the ambulance operator when he got there felt his pulse and it was still beating, but that there was visible purple and blue discoloration apparent to everyone there around his lips and above them. Assume that he died enroute to the hospital where he was pronounced dead of coronary (344) thrombosis by Dr. Prout upon arrival. Assume that no autopsy was performed. Now, Doctor, I have tried to give you what the records written in this man's own handwriting showed (indicating), that he was doing during those days of his life together with the testimony of others that worked with him, together with the testimony of the widow who sits here in the Courtroom and who kissed him goodbye at five o'clock never to see him alive again. Now Doctor, assuming those facts to be true and correct, can you form an opinion as to the probable cause of this man's heart attack?"

Based upon this kind of evidence the Circuit Court of Appeals held that the evidence did not raise an issue of fact for the jury.

Indeed, the Fifth Circuit as shown by the Motion for Rehearing even refused to reverse and remand the case for newly discovered evidence and in order that justice might be done in a case where the Petitioners discovered that one of the deceased co-employees had observed contusions upon and about the face of deceased and had given a written

statement to Respondent so advising Respondent but had refused to disclose such evidence to Petitioner's attorney.

This is certainly not the search for truth and justice that we believe our courts and particularly this Court, the highest Court of our land, were created to maintain.

VI.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals is not in accord with applicable decisions of the Supreme Court of Texas.

The holdings complained of under the preceding statement and preceding questions are in direct conflict with the Supreme Court of Texas decisions on this subject as discussed under our Statement.

Since the Court of Civil Appeals did not follow the law of Texas a typical situation is presented in which this Honorable Court has on a number of occasions granted writs of certiorari.

Erie R. Co. v. Tompkins, 304 U.S. 64;
Russell v. Todd, 309 U.S. 280;
Wichita Royalty Co. v. City National Bank, 306 U.S. 103;
Guaranty Trust Co. v. York, 320 U.S. 99.
See also *Rules of Decision Act, U.S.C., Section 1652.*

Certiorari was also apparently granted by this Honorable Court for this reason in *Phillips Petroleum Co. v. Gibson*, 232 Fed. 2d 13, 1 L. Ed. 2d 77.

The granting of the writ by this Honorable Court in the *Gibson* case was a matter of great significance to the legal world and to all litigants in personal injury suits of the character here involved.

Following the decision of this Honorable Court in the *Gibson* case, supra, the United States Court of Appeals for the Ninth Circuit said:

> "In considering a case of this kind we should take note of the precedents established by the Supreme Court when it is proper to take a case from the jury. For although, this is a diversity case, it was tried in a federal court where considerations relating to the Seventh Amendment must prevail." *Smith v. Rusk*, 245 Fed. 2d 348.

Citing with approval *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 and *Reynolds v. Pegler*, 223 Fed. 2d 429.

Professor Leon Green in an illuminating article entitled: "Protection of Jury Trial in Diversity cases." June, 1957 Texas Law Review has this to say about the action of this Honorable Court in the *Gibson* case, supra:

> "The conclusion is that the Supreme Court was not willing to go along with the Texas Court in the determination of this issue as a matter of law by virtue of the local doctrine.
>
> "No doubt the controlling matter here is the attitude of the Supreme Court towards the protection of jury trial under the 7th Amendment. The doctrine of the Texas Court is a transparent device to syphon off the powers of the jury by converting a question of fact into a question of law."

On Page 770 Professor Green continues:

> "Thus, under the Supreme Court decision it would seem that when the right of jury trial in the federal court collides with Erie v. Tompkins, the Supreme Court as in the F.E.L.A. cases will stick with jury trial and not allow practices of any type designed to deprive a litigant of his Constitutional right."

Citing *Dice v. Akron C. & Y. R.R.*, 342 U.S. 359, and *Brown v. Western Ry. Co.*, 338 U.S. 294.

Professor Green continues, page 770:

> "How far the Supreme Court is prepared to go in protecting jury trials in common law cases in the federal courts against state court invasions is an interesting question, and one highly important to litigants in the area of personal injuries."

Professor Green of the law faculty of the University of Texas agrees with the action of this Honorable Court in the *Gibson* case with these remarks:

> "In Texas, especially by virtue of its complex proximate cause and negligence per se doctrines, buttressed by intricate and numerous special issues, jury trial has been greatly impaired." Citing *Arnold v. Panhandle & Santa Fe Ry. Co.*, 77 Sup. Ct. 840.

However, in this case, this is not our problem. In this case, the Court of Appeals tried to say that the Supreme Court of Texas would not follow the Supreme Court of Texas decision in *American National Insurance Co. v. Fox*, 184 S.W. 2d 937. We ask how far can a Circuit Court be permitted to go by this Court when they ignored the Erie decision by this Court that has never been overruled by this or any other Court since its adoption. Is the law of the

Supreme Court of the State of Texas controlling here or is the Erie decision subject to the whims, caprices, conjecture and speculation of the Fifth Circuit. If so, shouldn't this Court hold in effect that the Supreme Court of Texas has no right to determine the law of its own state in a case where no federal statutes or constitutional provisions are involved, save petitioners right to trial by jury.

2. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

E. G. Ives v. Grand Trunk R. Co., 638 S. Ct. 1077, 319 U.S. 372;

Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608

3. The questions here presented have great importance and far-reaching effect to the millions of policy holders throughout the United States whose bread winner might suffer death as a result of accidental personal injuries.

4. The opinion of the Fifth Circuit Court of Appeals in this case is in direct conflict with the following decisions. All of these matters and authorities were urged in Appellee's Brief in Support of Motion for Rehearing.

Home Ins. Co. of New York v. Tydal Co., et al, 157 F. 2d 851

Pruett v. Marshall, 283 F. 2d 436, 439

Badger Mutual Insurance Company v. Morgan, 313 F. 2d 783, 786

Hanover Fre Insurance Company v. Sides, 320 F. 2d 437 (1963)

Spach v. Monarch Insurance Company of Ohio, 309 F. 2d 949 (1962)

Royal Indennity Company v. Curtis, 256 F. 2d 329, 330

American Casualty Co. of Reading, Pa. v. Myrick, 304 F. 2d 179 (1962)

American National Insurance Co. v. Fox, 184 S.W. 2d 937

Warbende v Prudential Insurance Company of America, 97 F. 2d 749, Annotated 117 A.L.R. 799

Mutual Life Insurance Company of New York v. Schenkat, 62 F. 2d 236

Wiecking v. Phoenix Mutual Life Insurance Company, 116 F. 2d 90

Order of United Commercial Travelers v. Siever, 121 F. 2d 660

Stroehmann v. Mutual Life Ins. Co., 300 U.S. 435, 57 S. Ct. 607, 81 L. Ed. 732

Wendorff v. Missouri State Life Ins. Co., 318 Mo. 363, 1 S.W. 2d 99

Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S.W. 151, Ann. Cas. 1912 D, 483

Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S.W. 1102

State et rel. Mutual Benefit, Health & Accid. Ass'n. v. Trimble, 334 Mo. 920, 68 S.W. 2d 685

Carroll v. Magnolia Petroleum Company, 223 F. 2d 657 (5th Cir. 1955)

Even if we assume that petitioner is wrong in the statement that the Fifth Circuit has failed to follow the decisions of the Supreme Court of Texas, said Circuit Court has erred in applying Federal decisions and in violating the federal rules requiring jury trials in diversity cases where fact issues are raised as are here raised by the record in this cause. All recent decisions of the Fifth Circuit of the United States hold that the Seventh Amendment guarantying a jury trial would control *if a fact issue was raised under federal law as distinguished from state law.*

The Fifth Circuit recognizes this rule of law in its recent decision in ABC-Paramount Records, Inc. v. Topps Record Distributing Co., 374 F. 2d 455 (Reh. den. April 27, 1967), in the following language:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, *it distributes trial functions between judge and jury and under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury*, Jacob v. (City of) New York, 315 U.S. 752 (62 S. Ct. 854, 86 L. Ed. 1166). The policy of uniform enforcement of state-created rights and obligations, see e.g., Guaranty Trust Co. (of New York) v. York (US), supra, cannot in every case exact compliance with a state rule—not bound up with

rights and obligations—which disrupts the federal system of allocating functions between federal system of allocating functions between judge and jury. Herron v. Southern Pacific Co., 283 U.S. 91 (51 S. Ct. 383, 75 L. Ed. 857). Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." 78 S. Ct. at 900-901, 2 L. Ed. 2d at 962-963.

"Byrd v. Blue Ridge Rural Electric Cooperative, 1958, 356 U.S. 525, 536-538, 78 S. St. 893, 900-901, 2 L. Ed. 2d 953, 962-963, reh. den. 357 U.S. 933, 78 S. Ct. 1366, 2 L. Ed. 2d 1375 (1958).

"(6) In *Byrd*, the Supreme Court held that *Erie* did not prevent the issue of whether Byrd was covered by workmen's compensation, which would be tried to a judge in a state trial, from being tried to a jury in a federal diversity case. The Court continued:

> 'It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the Federal courts.'

356 U.S. at 538, 78 S. Ct. at 901, 2 L. Ed. 2d at 963.

"(7, 8) In the present case, the federal courts' judge-jury relationship would suffer a similar disruption if the trial judge had to apply the Florida rather than the federal standard of sufficiency of evidence in determining whether to take away from the jury certain fact issues concerning damages. This Court has held repeatedly that '* * * in a diversity case, *state law controls as to the substantive elements of plaintiff's case and of defendant's defense, but the sufficiency of the evidence to raise a question of fact for the jury is controlled by federal law.*' Shirey v. Louisville & Nashville R. Co., 5 Cir. 1964, 327 F. 2d 549, 552; Melton v. Greyhound Corp., 5 Cir., 1965, 354 F. 2d 970; Kirby Lumber

Corp. v. White, 5 Cir. 1961, 288 F. 2d 566; Revlon, Inc. v. Buchanan, 5 Cir. 1959, 271 F. 2nd 795, 81 A.L.R. 2d 222; Reuter v. Eastern Air Lines, 5 Cir. 1955, 226 F. 2d 443."

One of the latest cases on the subject by this Honorable Court is the case of *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 7 L. Ed. 2d 798. Mr. Justice Douglas, speaking for the Court, said this in no uncertain terms:

> "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. As in cases under the Jones Act (Schulz v. Pennsylvania R. Co. 350 US 523, 100 L ed 668, 76 S Ct 608; Senko v La Crosse Dredging Corp. 352 US 370, 1 L ed 2d 404, 77 S Ct 415) and under the Federal Employers' Liability Act (Tennant v. Peoria & P.U.R. Co. 321 US 29, 88 L ed 520, 64 S Ct 409, 15 NCCA NS 647; Ellis v Union P. R. Co. 329 US 649, 653, 91 L ed 572, 576, 67 S Ct 598; Dice v. Akron, C. & Y. R. Co. 342 US 359, 96 L ed 398, 72 S Ct 312; Rogers v Missouri Pacific R. Co. 352 US 500, 1 L ed 2d 493, 77 S Ct 443), trial by jury is part of the remedy. Thus the *provisions of the Seventh Amendment, noted above, are brought into play*. Schulz v Pennsylvania R. Co. supra (350 US at 524). As we recently stated in another diversity case, *it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'* Byrd v. Blue Ridge Rural Electric Co-op., Inc. 356 US 525, 538, 539, 2 L ed 2d 953, 963, 78 S Ct 893. And see Herron v Southern P. Co. 283 US 91, 94, 95, 75 L ed 857, 860, 51 S Ct 383."

We therefore, respectfully submit that if the court assumes that petitioner is correct under the Texas decisions and that we are entitled to jury trial of fact issues under the Texas Law, that the Fifth Circuit failed to follow the law of Texas.

In the alternative, we submit that if the Fifth Circuit is right and had a right to construe the law of Texas in overruling the *Fox* case, that in any event in a diversity case the federal policy favors under the Seventh Amendment submission of these kind of matters to a jury for a fact determination and, hence, this Honorable Court on either theory should grant this Writ of Certiorari and affirm the Judgment of the trial court without further hearing or opinion as was done by this Court in the *Gibson* case, supra. We respectfully submit that the widow and her minor cildren are now entitled to the protection of the policy without further grievous delay.

Judge Noel, speaking for the Circuit Court of Appeals, clearly departed from the Texas rule as laid down by the Fifth Circuit in the case of *Carroll v. Magnolia Petroleum Company*, 223 F. 2d 657 (5th Circuit, 1955) and *Maryland Casualty Co. v. Broadway*, 110 F. 2d 357, (5th Circuit, 1940). Judge Noel not only did this but in effect, the Court as clearly shown by its opinion, attempted to overrule the *Fox* case, supra, 184 S.W. 2d 937, ref. w.m. without discussion of the opinion (exactly in point) by Chief Justice Calvert of the Texas Supreme Court in *Great American Reserve Insurance Co. v. Britton*, 406 S.W. 2d 901, decided July 27, 1966, rehearing denied November 2, 1966.

The Court of Appeals, in its attempt to distinguish the *Fox* case, supra, cited in a footnote that Fox was concerned with death caused by heat from the sun which is established

under Texas Law as an accidental bodily injury. In the body of the opinion, Judge Noel states as follows:

> "Now, is there a correlation between the bodily injury suffered by Kegley and cyanosis? The court in *Fox* concluded that sunstroke was the sole cause of death and, with this extremely important part of the puzzle solved, only had to determine if there was evidence on the exterior of the body which corresponded with the injury caused by the sunstroke."

The Court of Appeals apparently felt that the accident in this case was not an accidental injury and it can well be seen that this assumption is true when the court cites Dr. Prout in the footnote of the opinion to the effect that Dr. Prout said nothing of an accidental injury when the true facts were that at the time of Dr. Prout's brief examination following the death of decedent and at the time Dr. Prout wrote the death certificate, he did not know any facts concerning the history or work record of the deceased for a period of five days preceding his death, and in his brief opinion as to the cause of accident, the court ignored all of the 5 days of hard labor under exceptionally strenuous circumstances that Kegley was called upon to perform by his employer. This mistake probably stems from the fact that we had put two witnesses on hypothetically before we were able to procure from the respondent, under the direction of the trial judge, the work record of Kegley. It was then realized or should have been realized that Kegley unquestionably sustained an accidental injury. The decision of the Court of Appeals in *Maryland Casualty Company v. Broad-*

way, 110 F. 2d 357, clearly shows that this type of overexertion is an accidental injury in this language:

> *"But if the bodily injury is referable to a definite occurrence or series of occurrences in the work to which a time and place may be assigned*, it may be compensable though it does not result instantly."

The overexertion here was clearly limited to the five days preceding Kegley's death.

This case accords with the latest Texas case, *Consolidated Underwriters v. Wright*, 408 S.W. 2d 140, and hence, *there has been a clear departure in intimating that Kegley had not sustained an accidental injury in the effort of the Court of Appeals to distinguish the Fox case from the prior holdings of the Court of Appeals and the Texas Court on whether or not there was an accidental injury in this case.* We think as a matter of law the evidence shows without dispute that there was an accidental injury within the controlling rules stated in *Broadway* and *Wright*. supra. The *Fox* case following the leading case on this subject.

Which the Fifth Circuit, in its opinion, ignored said case being *Warbende v. Prudential Ins. Co. of America*, 97 F. 2d 749, quoted in American Jurisprudence as the leading case on this subject, 117 A.L.R. 760.

The Supreme Court of Texas in the *Fox case with great care points out that the Texas rule is different from that in other states.* We quote from the *Fox* case on page 942, as follows:

> "(7) Although there is a division of authority on the question in other jurisdictions, it is settled in Texas that a heat stroke may be a bodily injury within the meaning of a policy provisions like the one here in-

volved. Bryant v. Continental Casualty Co., 107 Tex. 582, 182 S.W. 673, L.R.A. 1916 E., 945, Ann. Cas. 1918 A 517; Metropolitan Life Ins. Co. v. Funderburk, Tex. Civ. App. 81 S.W. 2d 132, error dismissed; American Nat'l Ins. Co. v. Bennie, Tex. Civ. App., 106 S.W. 2d 336, error refused. In the last cited case the court quotes with approval the following statement taken from the annotation in A.L.R. 1197:

> 'It is held by the weight of authority, and apparently the better reasoned cases, that a sunstroke by one unexpectedly, is within the protection of an accident policy insuring against bodily injuries sustained through external, violent, and accidental means.'

"The reason announced by all the courts who adopt this view is *that a sunstroke, although it may be regarded as a disease by medical science, is generally regarded as an accident by the average layman who purchases accident insurance.* The question is discussed at great length in the Bryant case, supra, and for another comprehensive discussion of the leading cases see Richards v. Standard Acc. Ins. Co., 58 Utah 622, 200 P. 1017, 17 A.L.R. 1183. Appellant cites the opinion of the United States Supreme Court in Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491, 54 S. Ct. 491, 78 L. Ed. 934, 90 A.L.R. 1382, but our Texas courts have adopted the view expressed in the dissenting opinion of Mr. Justice Cardozo. See American Nat. Ins. Co. v. Bennie, supra."

The Court of Appeals in reaching the decision that as a matter of law Kegley did not have an accidental injury and that cyanosis as a matter of law could not be a visible contusion or wound on the exterior of the body relied upon *Massachusetts Mutual Life Ins. Co. v. Pistolesi,* 160 F. 2d 668, and *Paul Revere Life Insurance Company v. Stanfield,* 151 F. 2d 776. In these cases *there was no medical evidence*

showing whether the cyanosis was a visible contusion or wound on the exterior of the body and hence the Court of Appeals was allowed to make its own medical findings based upon the dictionary.

We ask this Court to consider the hypothetical question heretofore set out in this Petition, propounded to Dr. Homan and the answers of Dr. Homan thereto (R. 351-356, reasked after objection to the question, R. 375-376, as follows (R. 376-381), (these questions and the answers thereto are of such controlling importance that we deem a question and answer quotation necessary).

> "Q. Oh, yes, one other thing, and that instead of saying that everybody saw the blueness of the lips, I just (363) want you to assume that Mr. Smoot did, Mr. Winkler did, members of the crew, and Mr. Miller, the ambulance driver, did; and then assuming everything else with those amendments to be true and correct, can you form an opinion as to the probable cause of his death?
>
> "A. Yes, sir.
>
> "Q. What is that opinion, Doctor?
>
> "A. I think he died of a myocardial infarction or coronary occlusion due to overwork, sustained overwork during a period of time.
>
> "Q. Doctor, I want to ask you, have you, during the forty-one years that you have treated people for heart trouble and heart disease and heart injuries, have you on many occasions, after they have died and an autopsy has been performed, in the sense of self education and to confirm what you have thought about them, been present and observed autopsies, many, perhaps thousands of times?
>
> "A. Well, hundreds of times I would say, yes, sir.

"Q. And, Doctor, assuming that the only doctor that ever did get to examine this man, Dr. Prout, said that he had a normal heart and a normal blood pressure, and assuming that he was a powerfully built man and was able to work long hours and still bowl at night, of course, I don't imagine he was doing very much bowling (364) when this was going on (indicating)—

"The Court:

"Mr. Watts, just ask the questions, please, with no sidebar comments.

"Q. All right, but assume that he was able to do all of those things side by side with his doctor, and that to his doctor he appeared to have recovered from his influenza, in fact, it wasn't serious enough to keep him from doing all of this eight to ten hours of this kind of daily work, the influenza, now, Doctor, is it possible, in your opinion, from your forty-one years of experience, not to mention the many years of study that you have made in specializing in diseases and injuries of the heart, for a man to have an injury due to this kind of activity and still have a normal heart at forty years of age?

"Mr. Gilliland:

"Now, Your Honor, at this time I want to interpose the same objection to that question that Mr. Watts interposed to the question that I propounded to Dr. McDaniel, and that is that all of the facts and circumstances of the case are not in evidence.

"Mr. Watts:

"Well, we at least put a few of (365) them in evidence he didn't put hardly any of them in evidence when he was delivering that lecture.

"The Court:

"Well, let me see if I have your question right, are you repeating the entire hypothetical question?

"Mr. Watts:

"Yes, sir.

"The Court:

"And exactly what are you asking?

"Questions by Mr. Watts:
(Cont'd.)

"Q. All right, is it possible, assuming all of the facts in the hypothetical question to be true, for a man to have a normal heart, this man, and still have a coronary occlusion from these kind of work conditions that we have enumerated?

"Mr. Gilliland:

"Now, Your Honor, which hypothetical question is he speaking of?

"The Court:

"I sustain the objection until you identify whether it is the original here as amended.

"Mr. Watts:

"The one as amended.

"The Court:

"Or the very last one, the short one that you gave.

"Mr. Watts:

"Well, I think either one of them is proper.

(366) "The Court:

"Well, I think they are not sufficiently definite for the Court to understand which one you have reference to or what you are limiting the facts to, and I am going to ask you to re word your question to make it clear.

"Mr. Watts:

"I will re-word it, but may I call the attention of the Court that over our protest this witness that he put on said that a man with a normal heart couldn't suf-

fer a coronary thrombosis and I would like to impeach that testimony.

"The Court:

"All right, well, frame your questions accordingly.

"Questions by Mr. Watts:
(Cont'd.)

"Q. All right, is it possible for a man forty years of age with a normal heart, under the conditions set forth in my first amended hypothetical question, to sustain a heart attack?

"A. Yes, sir.

"Q. How is it possible for a man with a normal heart to have it caused by over-exertion and strain such as we have detailed this man underwent for a few days before his injury, Doctor?

"A. Well, we know that the heart is a muscle, a big muscle, a muscular pump, and the heart muscle itself (367) must be supplied with blood vessels to sustain it. We also know that those blood vessels, the coronary arteries, are made up of three layers, the outer layer, or the adventitia, we call it, the middle layer, or the muscular coat, and the innter layer, or the intima, as we call it, which is very thin. The muscular coat and the other two all must be supplied by blood. The muscular coat is generally supplied with little arteries that are called end arteries, and under sustained exertion sometimes one of those little arteries will rupture and start leaking blood. Well, when it does, there is only one way for it to go, and that is the line of least resistance is to the inner surface, that is the channel the blood is going through in the coronary artery, and that might vary, it might happen quickly, or it might take, according to the size of the little vessel that was ruptured, might take a good while, but gradually it will occlude that coronary artery, that branch where the injury is sustained, and that can happen in a normal heart.

"Q. Yes, sir, in other words, the attack doesn't always immediately follow the straining?

"A. That is correct.

"Q. Now, Doctor, assuming the facts that I have set forth (382) in my amended hypothetical question, the first amended one, in the few little respects that it was amended, to be true and correct, would you say that the heart attack that this man suffered was caused solely by the sustained over-exertion that he went through during that period of time preceding his injury entirely exclusive of and independently of any disease and any other condition of the heart?

"A. Assuming that he had a normal heart?

"Q. Yes, sir.

"A. Yes, sir, there is no doubt but what he had a coronary occlusion, a myocardial infarction, and if he had a normal heart, and we assume that, I would think that it would be caused by just this thing that I have just enumerated.

"Q. Solely caused by that?

"A. Yes, sir.

"Q. All right. Now, Doctor, is this purple discoloration that he had there immediately after this attack, is that outward visible external evidence of an internal damage or injury to the body, in this case the heart?

"A. I would judge so, a collapse of circulation due to injury to the heart."

By ignoring this evidence and making these determinations the Court of Appeals has denied the right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States, to June Kegley.

The Court of Appeals in making the decision has likewise ignored not only the *Fox* case and the cases upon which Fox

relies, but the Court of Appeals ignored the testimony of Dr. Homan, an outstanding cardiologist from El Paso, Texas as is set out in the Statement of Appellee's Brief in Support of Motion for Rehearing to which we refer this Honorable Court without the necessity of lengthening this Petition since the evidence covers several pages which has been ignored and disregarded.

Of course, it is a fundamental principle of law that in passing upon the question of sufficiency of evidence all inferences are to be indulged in favor of the evidence actually offered, but the Court of Appeals has violated this well established principle and has undertaken to set itself up as a medical investigative body as shown by the opinion in this cause. Under Supreme Court of Texas decisions hereinabove exercised Court of Appeals was bound as a matter of law to follow, and hence certiorari should be granted.

It is necessary to quote at great length from the *Britton* case which is self-explanatory, beginning on page 904, as follows: to determine this important question of whether fact issues exist as to whether Kegley died of disease or of an accidental injury as required by the terms of the insurance policy.

> "There is considerable lay testimony in the record indicating that the insured appeared to be in good health when the policy was delivered. The evidence is set out in detail in the opinion of the Court of Civil Appeals. We need not notice this testimony further as it does not control decision of the issue as we have stated it.
>
> "The evidence which Great American asserts establishes as a matter of law that Britton was not in good health consists of the deposition testimony of Dr. John

G. Bagwell; a hospital record of a medical history and diagnosis made by Dr. C. D. McMillan; testimony of Dr. Lester Hodges, Britton's family physician; and Britton's death certificate.

"Dr. Bagwell examined Britton on May 1, 1959, some two years and four months before the policy was delivered. Britton went to see Dr. Bagwell because he was having a tremendous amount of gas pressure and pains in his chest. In May, 1962, Dr. Hodges recommended that Britton see Dr. McMillan because 'he was having difficulty with his stomach, and he was burning and (had) symptoms of an ulcer.' Britton was hospitalized by Dr. McMillan from May 15 to May 18, 1962, three years after the examination by Dr. Bagwell and some eight months after the insurance policy was delivered.

"Britton gave both doctors a history of chest pain which radiated into his arms. Dr. Bagwell was convinced by the history given him, a physical examination which was 'considered to not show any definite abnormality,' x-rays which were 'considered to be normal,' and an electrocardiogram showing features 'considered to be probably abnormal' that Britton had 'heart trouble' which he diagnosed as 'angina pectoris, probably due to arteriosclerosis', and for which he prescribed nitroglycerin tablets for relief of pain. Dr. McMillan concluded from the history given him, a physical examination which 'failed to disclose any significant abnormality,' and tests which revealed 'changes consistent with left ventricular hypertrophy' and 'positive changes indicative of coronary sclerosis' that Britton had a duodenal ulcer of recent origin, chronic gastritis and 'coronary insufficiency.'

"Britton was found dead in his bed in the morning of February 6, 1963. The death certificate, signed by Dr. Hodges, gave the immediate cause of death as 'myocardial infarction.'

"Great American does not contend that Britton had the duodenal ulcer, found by Dr. McMillan, when the

policy was delivered, or that chronic gastritis would void the policy. We narrow our attention, therefore, to the evidence relating to Britton's heart condition.

"(2, 4) An insurance policy requirement that an applicant for insurance be in 'good health' does not mean 'perfect health.' If it did, all policies could be canceled within the contestable period. It is for this reason that the courts have evolved certain standards for measuring 'good health'. The term is usually defined as a state of health free from any disease or bodily infirmity of a substantial nature which affects the general soundness and healthfulness of the system seriously or materially increases the risk to be assumed by the insurer. See Sovereign Camp, W.O.W. v. Derrick, Tex. Civ. App., 64 S.W. 2d 982, 983 (1933) writ refused; Vann v. National Life & Accident Ins. Co., Tex. Com. App. 24 S.W. 2d 347, 349 (1930); Southern Surety Co. v. Benton, Tex. Com. App. 280 S.W. 551 (1926); Hines v. Kansas City Life Ins. Co., Tex. Civ. App. 260 S.W. 688, 690 (1924), writ dism; National Life & Accident Co. v. Moses, Tex. Civ. App., 257 S.W. 289 (1923), no writ hist.; Couch on Insurance, sec. 885 a. We have also held that a good health provision is breached if the applicant 'is suffering from a serious kind of illness, which continues and eventually causes his death.' Texas Prudential Ins. Co. v. Dillard, 158 Tex. 15, 307 S.W. 2d 242, 247 (1957). The conclusiveness of Great American's proof that Britton was not in good health must be tested by these Standards.

"(5) Although Dr. Bagwell's testimony is highly equivocal at best, for opinion purposes we may treat the testimony as establishing conclusively that Britton had 'heart trouble', which Dr. Bagwell diagnosed as 'angina pectoris' but which Dr. McMillan diagnosed as 'coronary insufficient'. We are next met with this question: How seriously did the 'heart trouble', 'angina pectoris', or 'coronary insufficient' affect the general soundness and healthfulness of Britton's system generally, and

how materially did they increase the risk of Great American? These are matters about which expert medical witnesses would be competent to testify, but the only competent evidence having any bearing on the question which we may consider is testimony of Dr. Hodges that angina 'is a continuing type of disease'. The result is that to hold the good health provision of the policy was breached as a matter of law we would have to take judicial notice that the nature of one or more of the ailments was such as to seriously affect the soundness of Britton's health or to materially increase Great American's risk. These are relative matters, and except in extreme cases should be left for jury determination from evidence introduced on trial.

"(6) 'Heart trouble' is a broad term and no doubt encompasses more than one type of specific ailment. 'Angina pectoris' is defined by Webster's Third New International Dictionary as 'a disease characterized by paroxysmal attacks of substernal pain of short duration that is usually associated with a sense of apprehension or fear of impending death, precipitated by effort or emotion, and relieved quickly by rest or administration of nitroglycerin.' Although angina may be, as Dr. Hodges testified, a continuing disease, the evidence does not tell us whether during its continuance it has a progressively more serious effect on health or the rapidity of its progression. In American Casualty & Life Co. v. Gueringer, Tex. Civ. App., 205 S.W. 2d 423, 424 (1947), no writ hist., the court noted that the 'details of the nature and progress of the disease of cancer are not subjects of either common or judicial knowledge.' Neither may we know the details of the nature and progress of angina pectoris from common or judicial knowledge. In this connection, it is to be noted that Dr. McMillan's final diagnosis, made three years after diagnosis by Dr. Bagwell and eight months after delivery of the policy, was 'coronary insufficiency.' Webster's, supra, defines 'coronary insufficiency' as 'coronary insufficiency of relatively mild degree.'

"(7) In Dillard, supra, the evidence was conclusive that the applicant had epilepsy in its most serious form when the policy was delivered, and that the affliction was the cause of death. On that proof was concluded that the insurer had established breach of a good health provision as a matter of law. Dillard does not rule this case. As pointed out, the evidence here does not conclusively establish a serious infirmity when the policy was delivered. Moreover, death from angina pectoris is not conclusively established. Webster's, supra, defines 'myocardial infarction' as 'infarction of the myocardium, typically resulting from coronary occlusion,' and defines 'coronary occlusion' as 'the partial or complete blocking of a coronary artery (as by a thrombus by spasm or sclerosis of the artery).' We may believe or strongly suspect that Britton's death from a myocardial infraction was caused by sclerosis of an antery rather than by a thrombus, but we do not know it and no evidence was offered to prove it. We hold that the evidence does not establish conclusively, according to legal standards that Britton was not in good health when the policy was delivered. Great American's motion for instructed verdict was properly overruled.

"The principal cases cited by Great American for a contrary conclusion are Dillard, supra; Lincoln Income Life Ins. Co. v. Mayberry, 162 Tex. 492, 347 S.W. 2d 598 (1961) and Great National Life Ins. Co. v. Hulme, 134 Tex. 539, 136 S.W. 2d 602, (1940). We have dealt with Dillard. In Mayberry the insured child died within two days of delivery of the policy, and the medical evidence was that at the time of delivery thereof the physical condition of the child was such that it had only a fifty-fifty chance of survival. There is no such evidence in this case. In Hulme there were jury findings supporting the conclusion that the insured was not in good health. See opinion of Court of Civil Appeals, 116 S.W. 2d 459, 460 (1938).

> *"Voiding insurance policies on judicial knowledge of the 'substantial' character of certain diseases and their 'serious' effect on health is a dangerous encroachment into an area of expert medical opinion.* It is safer to require proof; and proof at the trial court level may well settle the issue."

The Circuit Court of Appeals likewise departed from a well established rule of the Texas Courts in stating that cyanosis could not represent in this case a visible contusion or wound on the exterior of the body by relying upon the testimony of the defendant's doctor, Dr. McDaniel. Dr. McDaniel's testimony was stricken by the trial Court upon the grounds *it assumed facts not in evidence and correctly did so under the decision of the Court of Appeals in Carroll v. Magnolia Petroleum Company, 233 F. 2d 657.* In that case the Court of Appeals went to great lengths to point out that where an expert witness such as Dr. McDaniel had no knowledge of the specific case being tried, that a hypothetical question may be used in assuming facts, but care must be exercised to *assure that the facts stated in such question are supported by competent evidence in the record so as to prevent witnesses from invading or usurping the province of the jury and the issues to be decided.* We refer this Honorable Court to this decision so as to show.

The unquestioned error of the Court of Appeals in relying upon a witness whose *evidence was not competent in reaching its conclusion.* The entire opinion is worthy of reading. For the sake of brevity, we quote from the opinion on page 664, highlighting pertinent facts which are self-explanatory. This case clearly shows that the Court of Appeals by its opinion in this case has invaded the province of the jury

under the Seventh Amendment of the Constitution of the United States. The Fifth Circuit said this:

> "(1, 2) A properly qualified witness, whose training or experience, or both, has given him peculiar and reliable knowledge of the subject being explored, may give his opinion thereon to assist the trier of facts in handling specialized fields. However, it is always necessary to lay a proper foundation for such opinion evidenced by correlating the testimony with the facts of the particular case being tried. If the expert has no knowledge of these specific facts, the 'hypothetical question' may be used. Even then, care must be exercised to assure that the facts contained in the hypothetical question are supported by competent evidence in the record. It must always be remembered that the jury in sitting to hear and decide the facts, and in a case like this one, to determine the real cause of the accident. There is ever present danger that an expert witness may invade, indeed, usurp the jury's province by giving an opinion upon the ultimate issue to be decided; and only meticulous supervision by the trial judge can avoid such consequences.
>
> "(3-5) Applying these general remarks to the present case, we think it was entirely proper to allow experienced drillers and rig builders to explain in general terms the proper procedures for operating a drilling rig and for constructing an oil derrick, since it was certainly necessary for the jury to know something about these subjects in order to decide the case. However, we believe the record, as illustrated by the colloquy quoted in the footnote, clearly reveals that counsel for all parties and the trial court failed to bear in mind the true purpose and scope of expert testimony. Only one of the witnesses from whom such testimony was elicited was present when the accident occurred, and the judge quite properly refused to allow him to state whether he saw appellant do anything which in his opinion was a cause of the accident.

> Yet, Johnson was allowed to speculate as to the cause, and appellees' witnesses not only stated their opinions as to the cause but actually testified in detail what they thought appellant did to bring about the collapse of the derrick. Appellee's whole defense was predicated upon and built up around their expert testimony as to the cause, and their witnesses repeatedly referred to the velocity of the wind and the excessive swinging of the crown block in stating their opinions, although the only two witnesses on the scene swore the block was not swinging. A mere reading of their testimony illustrates clear examples of experts invading the province of the jury, and the error was compounded when they were allowed to assume facts not proven."

The Court of Appeals even attached significance to the fact that Dr. Prout did not mention any condition contributing to his death or described how the injury occurred in the death certificate as a matter of significance in this case, when Dr. Prout had no earthly knowledge as to the character of work that Kegley had been doing as described in the hypothetical question and hence, could not pass upon the question. *Dr. Prout, when presented with the facts, that is even a small portion of the facts, considered the death to be caused by accident and overexertion.* One would think from reading the opinion of the Court of Appeals in this case in a number of respects that the Court of Appeals had become carried away with the justness of the defendant's position as the opinion is so full of violations of precedents of the Supreme Court of Texas and the Court of Appeals.

There is nothing in the later case of *Mutual Benefit Health & Accident Ass'n v. Hudman*, 398 S.W. 2d 110, that

has served to overrule the *Fox* case as suggested by the Court of Appeals. It is true that that case limited coverage to death from accidental injury independent from other causes. The Court of Appeals in the *Hudman* case said as follows, and bear in mind that in the *Hudman* case, Justice Greenhill pointed out on page 115 of the opinion that the insurance coverage in that case covered *accidental bodily injuries received while you are driving or riding in a car. The overexertion Judge Greenhill stated, in which the insured engaged took place on the farm outside of the automobile, and that for these reasons the Court of Appeals correctly denied recovery on the policy.* However, the Supreme Court in the *Hudman* case recognized the rule that it required *the competent evidence of qualified persons to separate the real cause of death from mere conditions or at least raise issues for determination by the fact finder.* Likewise, in that case all of the medical experts agreed that the accidental injury concurred with a pre-existing disease to cause the death. The Supreme Court of Texas stated in Hudman supra:

> "The rule is cogently summarized in 1A Appleman, Insurance Law and Practice, §403:
>
> > 'As a general rule, it has been stated that if there is a pre-existing disorder or illness at the time an injury is received, recovery may still be had if the injury was severe enough to have caused the entire damage or considerable damage, but not if the disease was the proximate cause or principal cause thereof. From this, it has been held that where a disease condition aggravates the result of the injury or is, itself, aggravated thereby, there can be no recovery, where the combined result is to cause the death or disability. This has been

particularly supported where the death or disability would not have resulted from the external injury alone, but, with the combination of injury and disease, the loss is produced. * * *'

"(5) The result we reach in this case is compelled by the terms of the policy *and the evidence of all the physicians.* We do not hold that every pre-existing frailty or enfeeblement of the human body which coexists with an accidental injury will defeat recovery under such policies as Hudman's. To do so would defeat recovery in most instances because mere senescence makes all flesh heir to infirmity and weakness. Policies are, to use Cardozo's phrase, issued to those who are neither 'an Apollo or Hercules.' Silverstein v. Metropolitan Life Ins. Co., 254 N.Y. 81, 171 N.E. 914 (1930). Recovery is not defeated when a pre-existing condition or disorder is so remote in the scale of causation, so dormant and insubstantial, or so temporary and transient that it does not materially contribute to the death or injury. Howe v. National Life Ins. Co., 321 Mass. 283, 72 N.E. 2d 425, 170 A.L.R. 1254 (1947). In most cases the competent evidence of qualified persons separates the real causes of death or injury from mere conditions or at least raises issues for the determination by the fact finder. 29 Am. Jur. Insurance, §1211-1213; 82 A.L.R. 2d 614, 623; 56 A.L.R. 2d 806-808; 131 A.L.R. 266-269, 1 A Appleman, Insurance Law & Practice, §403, p. 88. *This is not our case. All the medical experts agreed that the accidental injury concurred with a pre-existing serious disease to cause the death.*"

The *Hudman* case is clearly in point with our position *that where there is competent medical evidence it is sufficient to raise issues of fact for the jury.* In this the Kegley case the medical experts disagreed. Hence a clear distinction exists here in favor of petitioners right of recovery under the policy.

If, under the evidence in the *Britton* case, where the man was taking nitroglycerin tablets for a heart condition, it can be said by the Supreme Court of Texas that he was in good health and that that condition *did not materially contribute to his death, then certainly the same can be said with greater force in the case at bar.*

It is likewise evident that there has been a clear departure as laid down by many decisions of the Court of Appeals and the Texas Courts that the policy is to be construed against the insurer who drew it and that *the policy would have to be construed in the light of Texas law with reference to the meaning of accidental injury.*

Petitioner cited to the Circuit Court of Appeals in addition on Motion for Rehearing, new cases involving blueness of the lips as an indication of bodily injury, in addition to the one which Judge Noel, in his opinion, has attempted to distinguish. It is quite evident that this decision is such a departure from well settled principles of law and particularly from the law of Texas, and represents such an injustice to the widow and children that under *Erie* and cases of like import, certiorari should be granted by this Court.

WHEREFORE, your Petitioner respectfully prays this Honorable Court to grant the Petition for Writ of Certiorari to the end that on review the Circuit Court may be directed to reverse its judgment and that this Court should affirm the

Judgment of the United States District Court in and for the Western District of Texas, Pecos Division.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Petition for Certiorari has been furnished counsel for Respondent, Mr. Elton Gilliland and Mr. James O'Leary, P. O. Box 1552, Odessa, Texas, by placing the same in the United States Mail, postage paid, Certified Mail, Return Receipt Requested, on this 19 day of Dec., A.D., 1967.

John G. Patterson